THE METAPHYSICAL BASES OF LIABILITY: COMMENTARY ON MICHAEL MOORE'S *CAUSATION AND RESPONSIBILITY*

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I. INTRODUCTION

Let me begin by saying how much I enjoyed Professor Michael Moore's thick, rich, and learned book.[1] I learned a great deal from reading it, and recommend it to anyone with an interest in any of the three topics it covers: moral responsibility, legal liability, and the metaphysics of causation. It covers such a wide breadth of terrain that even the most expert readers will learn a great deal from it. It is also very clearly and engagingly written. While it is possible to break the book roughly into sections corresponding to the three problem areas of ethics, legal theory, and metaphysics,[2] the real strength of the book lies in the interaction between these different topics. As a philosopher interested in the metaphysics of causation, I will focus my discussion on the last section of the book, but a discussion of the metaphysics that is divorced from the applications to ethics or legal theory would be impossible.

The last seven chapters of the book more or less stand alone, in the sense that one could start reading at chapter fourteen and have little difficulty following the discussion. Indeed, anyone who is not familiar with the current state of play in the philosophical literature on causation would get a solid overview from reading these chapters. For specialists in the theory of

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1. MICHAEL MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009).

2. Chapters two and three deal with ethics, chapters one and four through thirteen with legal theory, and chapters fourteen through twenty deal with metaphysics. *Id.* at 20–80, 3–19, 81–326, 327–512.

causation, there is not much that is dramatically new by way of metaphysics (with one exception, which I will mention below). This is not intended as a criticism. Moore's goal in these chapters is not to advance an original theory of the nature of causation, but rather to explore the range of proposals that are on offer, and to identify and defend the sort of account that he finds most plausible.[3] The real payoff is not in the metaphysics *per se*, but in the intriguing discussions of the relationship between the metaphysics and moral and legal theory.

My discussion will proceed as follows: I will begin with an altogether too brief summary of some of Moore's main conclusions. I will then give a brief exposition of some of my own views on the nature of causation. I will then use these as a springboard to raise some specific challenges for Professor Moore. Some of these will be challenges to specific claims that Moore defends. Others will be broader in nature: they are, I think, deep problems for philosophy as a whole, but problems that are often hidden in discussions of the relationship between causation and responsibility.

II. HIGHLIGHTS

It is, of course, impossible to do justice to a five hundred-page book in a short summary. I will attempt only to highlight some of Professor Moore's main conclusions, with a bias toward those that will be the focus of the subsequent discussion.

According to Moore, the primary function of criminal and tort law is to achieve justice: retributive justice in the case of criminal law, and corrective justice in the case of tort law.[4] This is contrasted, for example, with the views of economically oriented jurists such as Coase,[5] Calabresi,[6] and Landes and

3. Although I am not a specialist in either ethics or legal theory, my sense of the chapters on ethics is similar. Moore is not attempting to develop a new moral theory, but only to articulate a sensible and defensible position from among the views currently on offer. On the other hand, some of the discussion on legal theory does seem to be breaking new ground, even considered in isolation from the connections with ethics and metaphysics. I have in mind particularly the critiques of the harm-within-the-risk approach in chapters eight through ten, of intervening cause doctrines in chapters eleven and twelve, notions of accomplice liability in chapter thirteen, and insurance contracts involving the World Trade Center in the appendix. But I will leave it to others more qualified than I to discuss these in detail.

4. MOORE, *supra* note 1, at 95.

5. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1–44 (1960).

6. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 28 (1970).

Posner,[7] who claim that the function of the law is to achieve efficiency. In order to achieve justice, the law must employ notions of liability that closely track moral responsibility. Specifically, the law must strive to punish those who do wrong, and to compensate those who have been wronged.[8]

Moore's normative ethical theory, developed in chapters two and three, is a moderate deontology.[9] We have a variety of *prima facie* moral duties, both positive and negative.[10] Wrongdoing requires both an *actus reus* and a *mens rea*. I will put discussions of *mens rea* aside, and focus on *actus reus*. Moore argues that a principle basis for *actus reus* is the causation of harm to others.[11] This is not the only basis, however; we will discuss another such basis below. Moore allows some scope for justifying the violation of a prima facie duty by appeal to salutary consequences.[12] But such justification is especially limited in the case of causing harm to others. To use a standard illustration, it would not be morally permissible to kill an innocent person in order to harvest his organs, even if doing so will save three others in desperate need of transplants.

Since morality is central to law, and causation (especially causation of harm) is central to morality, causation must be central to the law. This is sometimes obscured by the fact that legal doctrines are cast in terms of causative verbs like 'kill,' rather than explicitly causal language like 'cause to die.' But such causative verbs are to be cashed out in terms of causation.[13] Moreover, the notion of causation that figures in the law is the natural one that we find in the world, not some kind of legal construct. [14]

Moore examines a number of the proximate cause doctrines that have been proposed in the law, and finds many of them wanting.[15] In particular, any doctrine that appeals to the intentions of agents, or the purpose of legal statutes, will not pass metaphysical muster. Consider, for example, standard intervening cause doctrines.[16] Suppose Defendant negligently spills

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7. William M. Landes & Richard Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109–34 (1983).

8. MOORE, *supra* note 1, at 92–96.

9. *Id.* at 20–80.

10. *Id.* at 38–40.

11. *Id.* at 81.

12. *Id.* at 40–41.

13. *Id.* at 3–19.

14. *Id.* at 95.

15. *Id.* at 109–36, 254–79.

16. *See* HERBERT L.A. HART & A. M. HONORÉ, CAUSATION IN THE LAW (2d ed. 1985) for further elaboration on intervening cause doctrines.

gasoline.[17] Bystander throws a lit cigarette into the gasoline, causing a fire.[18] According to standard intervening cause doctrines, if Bystander maliciously threw the cigarette into the gasoline, intending to cause a fire, his action constitutes an intervening cause, and the spilt gasoline is not considered a cause of the fire. However, if Bystander threw his cigarette innocently, for instance if he had no knowledge of the spilt gasoline, then his action is not an intervening cause, and the spilt gasoline is considered a cause of the fire. This is true, according to intervening cause doctrines, even though Bystander's bodily motions might be exactly the same in the two cases. Moore derides this way of thinking as a belief in 'telekinesis'[19]: it would imply that Bystander, by means of his will alone, can affect whether Defendant's action causes the fire.

Moore then canvasses a variety of accounts of causation drawn from both the philosophical and legal literatures. He tentatively advocates a singularist theory of causation,[20] although he leaves the details of such a theory unspecified. He defends two potentially controversial claims about causation. The first is that causation is a scalar quantity: it is not all-or-nothing, but can come in degrees.[21] In particular, causation can attenuate over the course of causal chains.[22] Although it is common in the psychological literature to assess subjects' judgments about the strength of causal relationships, the idea that causation might come in degrees as a matter of basic metaphysics is novel and interesting. It would be interesting to explore further the kinds of factors that influence degree of causation. The second controversial claim is that cases of omission, prevention, and 'double prevention'[23] are not cases of genuine causation.[24] For example, suppose Defendant sees Victim struggling in the water. Suppose that Defendant either (i) is a strong swimmer and could easily save Victim with no risk to herself, but does not do so; or (ii) cannot save Victim herself, but ties up a lifeguard who otherwise would have saved Victim. Then, according to Moore,

17. Since my discussion will involve numerous hypotheticals, it will be helpful to have a recurring cast of characters. Principal among these will be Defendant and Victim. It goes without saying that Defendant is to be presumed innocent until proven guilty. In order to distribute both harm and blame equally, I will change the genders of the actors at random.

18. This example is based on the facts of Watson v. Ky. & Ind. Bridge & Ry. Co., 126 S.W. 146 (Ky. 1910).

19. MOORE, *supra* note 1, at 137.

20. *Id.* at 496–512.

21. *Id.* at 71–73, 356–61.

22. *Id.* at 359.

23. *Id.* at 426.

24. *Id.* at 426–70.

Defendant did not *cause* Victim's death, although she might nonetheless be morally responsible and legally liable for Victim's death on some non-causal basis.[25]

Along the way, Moore presents a detailed critique of the counterfactual theory of causation, as enshrined in the 'but for' or '*sine qua non'* test in the law, and developed in detail by the philosopher David Lewis[26] and followers. As a first pass, such a theory will say that *C* is a cause of *E* just in case the following counterfactual is true: if *C* had not occurred, then *E* would not have occurred.[27] It will be helpful to briefly review Moore's main criticisms of this theory.

First, there are problems with the counterfactuals themselves.[28] In order for the counterfactual theory to have any hope of success, counterfactuals must not 'backtrack'[29] from effects to causes. For instance, after Defendant shoots Victim dead, we must not reason: 'if Victim hadn't died, then Defendant would not have shot him.' For if we do, the 'but for' test will tell us that Victim's death caused Defendant's shot, rather than (or in addition to) vice versa. Moore raises specific criticisms of Lewis's apparatus for generating the directionality of counterfactual dependence. But he also raises the question of whether the needed 'non-backtracking' counterfactuals are really the counterfactuals of ordinary language, rather than some kind of *ad hoc* construct. If not, causation is not really being analyzed in terms of counterfactuals, but rather in terms of whatever tools are used in the construction.

Second, counterfactual theories have well-known problems with cases of *preemption* and *overdetermination.*[30] Suppose, for example, that Defendant shoots Victim through the heart. Accomplice either (i) simultaneously shoots Victim through the heart; or (ii) shoots Victim a moment later, her bullet piercing Victim's heart after he has already died; or (iii) stands at the ready, determined to shoot if Defendant does not kill Victim. In all of these cases,

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25. *Id.* at 62–63.

26. *See, e.g.*, David Lewis, *Causation*, 70 J. PHIL. 556–67 (1973), *reprinted with postscripts in* DAVID LEWIS, PHILOSOPHICAL PAPERS, VOLUME II 159–213 (Oxford Univ. Press ed. 1986) [hereinafter PHILOSOPHICAL PAPERS], *and Causation as Influence*, 97 J. PHIL. 182 (2000). For an expanded version see CAUSATION AND COUNTERFACTUALS 75–106 (John Collins, Ned Hall & L. A. Paul eds., 2004) [hereinafter CAUSATION AND COUNTERFACTUALS].

27. It is standard to require, in addition, that *C* and *E* be events that actually occurred, and that they be distinct from one another. MOORE, *supra* note 1, at 401.

28. *Id.* at 371–90, 400–09.

29. This term is from David Lewis, *Counterfactual Dependence and Time's Arrow*, 13 NOÛS 455 (1979), *reprinted in* PHILOSOPHICAL PAPERS, *supra* note 26, at 32–33.

30. MOORE, *supra* note 1, at 410–25.

Defendant's shot is a cause of Victim's death, but it's false that if Defendant had not shot, Victim would not have died. Defenders of counterfactual theories have made numerous attempts to solve these problems, but Moore finds them wanting.

Third, counterfactual theories are overly promiscuous in what they count as causes.[31] In particular, a counterfactual theory would count omissions, preventions, and double-preventions as causes, when they are not.

I will discuss the third objection at some length in section five below, but wish to make a couple of brief remarks about the first two. With respect to the second objection, for the benefit of any causation geeks who might be reading, I point out that Moore does not discuss some of the most recent, and to my mind most promising, attempts to deal with cases of preemption and overdetermination. I have in mind particularly approaches based on causal modeling methods that have been developed by Ned Hall,[32] Joseph Halpern and Judea Pearl,[33] and myself,[34] as well as similar proposals (but not formulated in a causal modeling framework) by Stephen Yablo.[35] But Moore is certainly correct that preemption and overdetermination do pose serious problems for a counterfactual theory of causation. Moore also raises a blanket challenge to any such attempt to develop a more sophisticated counterfactual theory to handle cases of preemption and overdetermination.[36] Moore claims that even if these approaches are successful, something will have been lost. Causation still cannot be *identified* with counterfactual dependence.[37] I think that this deceptively simple complaint points to a genuine problem. I would bring this problem out in a slightly different way. If the simple version of a counterfactual theory of causation were correct, the theory would explain why causation is a natural, distinctive, and important relation. Suppose, however, that causation turns out to be extensionally equivalent to counterfactual dependence with bells and whistles added

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31. *Id.* at 394–400.

32. *See generally* N. Hall, *Structural Equations and Causation*, 132 PHIL. STUD. 109 (2007).

33. *See generally* Joseph Y. Halpern & Judea Pearl, *Causes and Explanations: A Structural-Model Approach. Part I: Causes*, 56 BRIT. J. FOR PHIL. SCI. 843 (2005).

34. Christopher Hitchcock, *The Intransitivity of Causation Revealed in Equations and Graphs*, 98 J. PHIL. 273, 274 (2001); Christopher Hitchcock, *Prevention, Preemption, and the Principle of Sufficient Reason*, 116 PHIL. REV. 495, 496–97 (2007).

35. Stephen Yablo, *De Facto Dependence*, 99 J. PHIL. 130 (2002); Stephen Yablo, *Advertisement for a Sketch of an Outline of a Prototheory of Causation*, *in* CAUSATION AND COUNTERFACTUALS, *supra* note 26, at 421–22.

36. MOORE, *supra* note 1, at 421–22.

37. *Id.* at 396.

(where these bells and whistles might themselves be definable in terms of counterfactuals). Pointing to this equivalence does not go very far toward explaining why causation is such an interesting or an important relation. Consider some other relation, *schmausation*, which can be defined in terms of counterfactual dependence, adding drums and trumpets instead of bells and whistles. From the perspective of the counterfactual theory, schmausation is no less natural or distinctive. So why has schmausation failed to attract the attention of metaphysicians, ethicists, and legal theorists?

With respect to Moore's first criticism of counterfactual theories, I offer an *ad hominem* response: Moore himself is committed to there being non-backtracking counterfactuals of exactly the sort required by a counterfactual theory of causation. This is because Moore claims that liability for omissions, preventions, and double-preventions, when it exists, is based upon counterfactual dependence.[38] For example, in the drowning scenarios described above, Defendant may be liable for Victim's death on the grounds that Victim would not have died if Defendant had saved her, or if Victim had not tied up the lifeguard. But if we couple this idea with backtracking counterfactuals, we will get absurd results. Suppose, for example, that Victim and Defendant are together when Victim is injured. Defendant takes Victim to the emergency room and remains with him. As a result, Defendant misses a scheduled meeting. Victim then sues Defendant for negligence in failing to attend the meeting. Victim's attorney reasons that since Defendant would never abandon an injured person just to attend a meeting, the following counterfactual must be true: if Defendant had attended the meeting, then Victim would not have been injured. Thus, Victim's attorney argues, Defendant is liable for Victim's injury, on the grounds that the injury was counterfactually dependent on Defendant's failure to attend the meeting. Clearly, if Moore is to ground liability for omissions, preventions, and double-preventions in counterfactual dependence, he will have to rule out these kinds of backtracking counterfactuals.

III. MY METAPHYSICS

I will now offer a quick sketch of my own metaphysical picture, developed and defended at length in a series of articles.[39] The basic notion is

38. *Id.* at 426–70.

39. *See generally* Christopher Hitchcock, *A Tale of Two Effects*, 110 PHIL. REV. 361 (2001); Christopher Hitchcock, *Of Humean Bondage*, 54 BRIT. J. FOR PHIL. SCI. 1 (2003); Christopher Hitchcock, *What Russell Got Right*, *in* CAUSATION, PHYSICS, AND THE

that of a causal *relationship* between *variables*. 'Variable,' here, is intended in the sense of a *random variable* from measure theory. Intuitively, a variable has 'values' that correspond to members of a set of incompatible possibilities. For instance, a variable may range over the possibilities 'raining' and 'not raining', representing the state of the weather at a particular time and place. Variables can be more or less coarse grained; for instance, we could have a variable with values 'heavy rain,' 'light rain,' 'overcast,' and 'sunny;' we could even have a variable with quantitative values corresponding to the rate of rainfall.

What it means for a relationship to be causal can best be approached indirectly by considering what makes a relationship non-causal. A relationship is non-causal if it is *accidental* or *spurious*.[40] Suppose, for example, that Defendant regularly walks to work along a route that takes her past Victim's house. Victim notices that on days when Defendant has her umbrella up, his basement tends to flood. On a particular Monday, Defendant walks past Victim's house with her umbrella up, and Defendant's basement floods shortly after that. The flooding occurs right after Defendant's action, and in close proximity to it. Moreover, there is a correlation between flooding and Defendant's walking with an open umbrella. But this is not a causal relationship. What is happening, of course, is that Defendant tends to have her umbrella open on days when it is raining heavily, and those are the days when Victim's basement is most likely to flood.

The notion of a causal relationship is closely related to Lewis's notion of a non-backtracking counterfactual involving propositions about distinct events.[41] In our example, we might reason as follows: Defendant is a reasonable person, and she does not like to get drenched, so if she had not been carrying an umbrella on that particular day, it would surely have been because it was not raining. This is a backtracking counterfactual. From the contrary-to-fact supposition that Defendant did not have her umbrella open, we reason backward to the absence of causes or conditions that would lead her to have her umbrella open. As we have already seen, a counterfactual theory of causation is a non-starter if counterfactuals are allowed to backtrack. Lewis posited that counterfactuals do not backtrack, and developed an elaborate apparatus to account for why they do not.[42]

CONSTITUTION OF REALITY 45 (Huw Price & Richard Corry eds., 2007); Christopher Hitchcock, *Three Concepts of Causation*, 2 PHIL. COMPASS 508 (2007).

40. Moore notes that the law is committed to excluding both of these from the notion of causation. MOORE, *supra* note 1, at 111–13.

41. PHILOSOPHICAL PAPERS, *supra* note 26, at 164–167, 170–171.

42. Lewis, *supra* note 29, at 34–37.

My own approach differs from Lewis's in three important respects. First, I harbor no reductive aspirations. While Lewis tried to account for the truth values of non-backtracking counterfactuals in non-causal terms, I do not strongly believe that this can or need be done. Second, I do not claim that non-backtracking counterfactuals are the standard or natural interpretations of ordinary language counterfactuals. I am satisfied if there is some class of counterfactuals that can be given a non-backtracking interpretation. In particular, I think that if I specify to my audience that my counterfactuals are non-backtrackers, I can make them understand me, and they will agree with me about the truth values of these counterfactuals so long as we agree on all of the underlying facts. Third, and most subtly, I think that once we have something like Lewis's non-backtracking counterfactuals, we are already within the realm of the causal. Lewis did not identify causation with counterfactual dependence (for reasons having to do with preemption); he thought that even once you had non-backtracking counterfactuals, there was still some work to be done to define the relation of *causation*.[43] But there is a tension in Lewis here. In "Causation," Lewis uses the term 'causal dependence' to denote non-backtracking counterfactual dependence among propositions about the occurrence or non-occurrence of events.[44] In a later paper,[45] he calls such non-backtracking counterfactuals 'causal counterfactuals.'[46] If 'causal' here is meant to be descriptive, and not merely a piece of technical jargon, then Lewis seems to be agreeing that we have already entered the realm of the causal once we have non-backtracking counterfactual dependence.[47]

Whatever one's views on the ultimate metaphysics of causal relationships, I think that defenders of manipulationist or interventionist theories of causation have far and away the best account of what is special and interesting about causal relationships. The idea behind interventionist accounts seems to go back at least to Galileo.[48] The view was resuscitated in

43. PHILOSOPHICAL PAPERS, *supra* note 26, at 167, 171–172

44. *Id.* at 165–67.

45. David Lewis, *Causal Decision Theory*, 59 AUSTL. J. PHIL. 5, 21–28 (1981), *reprinted in* PHILOSOPHICAL PAPERS, *supra* note 26, at 305–37.

46. PHILOSOPHICAL PAPERS, *supra* note 26, at 326.

47. As Carolina Sartorio pointed out to me, Lewis does consider counterfactual dependence to be *sufficient* for causation, so it is possible that he intends the adjective 'causal' to indicate that this counterfactual dependence indicates a particular type of causation. I think it is especially hard to square this explanation for his usage with *Causal Decision Theory*, *supra* note 45, where Lewis does not even appeal to his own account of causation.

48. *See* Steffen Ducheyne, *Galileo's Interventionist Notion of "Cause,"* 67 J. HIST. IDEAS 443, 459–64 (2006).

twentieth century analytic philosophy by Douglas Gasking,[49] and given a recent and detailed elaboration by James Woodward.[50] The idea is that causal relationships, unlike accidental or spurious relationships, remain stable under interventions on the (putative) causal variable.[51] Consider again our story of the umbrella and the flooded basement. As we saw, the correlation exists only because of the particular way in which Defendant's umbrella-carrying behavior is brought about: she chooses to carry her umbrella on days when it is raining. Suppose, however, some kind of intervention takes place to prevent her from carrying her umbrella in the usual manner. Perhaps Victim asks her nicely not to use it, and buys her a top-of-the-line raincoat to use instead. Perhaps Victim steals her umbrella. Or, to make the relevance to legal issues clear, suppose that Victim threatens Defendant with a lawsuit. We might even imagine that Defendant's umbrella magically vanishes, in what Lewis calls a 'small miracle.'[52] If Defendant's umbrella-carrying behavior were to be altered in any of these ways, the correlation between her walking with an open umbrella and Victim's flooded basement would cease to exist. Victim, by intervening on Defendant's behavior, makes no difference to whether his basement gets flooded. The key idea, then, is that causal relationships, unlike accidental or spurious relationships, can be exploited to produce desirable outcomes.

Note that even many of those whom Moore labels 'causal skeptics' are committed to this basic distinction between causal and non-causal relationships. For example, consider economically-oriented theorists such as Coase, Calabresi, or Landes and Posner,[53] who reject all notions of proximate causation in favor of a conception of the law according to which its goal is to promote efficiency. Since the law provides a series of incentives and disincentives to perform various actions, it is attempting to intervene on the actions of agents. These interventions will only be successful in promoting efficient outcomes if they target behaviors that are causally related to the outcomes in question. Suppose, for example, that the cost to Defendant of getting wet is less than the cost to Victim of a flooded basement. Nonetheless, providing a disincentive for Defendant to carry her umbrella, in the form of a right of Victim to sue for the cost of a flooded basement, will

49. *See generally* Douglas Gasking, *Causation and Recipes*, 64 MIND 479 (1955).

50. *See generally* JAMES WOODWARD, MAKING THINGS HAPPEN: A THEORY OF CAUSAL EXPLANATION (2003).

51. *Id.* at 25–38, 45–61, 65–70, 239–65.

52 . Lewis, *supra* note 29, at 47–48. Lewis also uses the adjectives 'little' and 'tiny' to describe these miracles. *Id.* at 44–45.

53. *See supra* notes 5–7.

do nothing to promote efficiency. All that will happen is that Defendant will get wet and Victim's basement will still get flooded. A similar remark applies to the probabilities that appear in the well-known Hand formula, described by Judge Learned Hand in his opinion in *United States v. Carroll Towing*,[54] for determining whether a risk is sufficiently great to constitute negligence. If these are just ordinary conditional probabilities, the formula will rule as negligent behaviors that are merely correlated with serious harms. In order for the formula to have any plausibility, the probabilities figuring in it must be the sorts of counterfactual probabilities employed by Lewis in the probabilistic version of his counterfactual theory,[55] or else the complex conditional probabilities employed in probabilistic theories of causation.[56]

Given the basic notion of a causal relationship, it is possible to define a number of different kinds of more specific relations. A simple example will help to illustrate. Suppose I press the power button on my stereo, I set the volume to four, the treble to five, and the bass to six. I put a copy of John Coltrane's *Giant Steps* in the CD player, and music comes out of the speakers. Consider the way in which the sound emanating from the speakers depends upon all of these factors. First, the power button can only be used to turn the music on or off. It has a kind of all-or-nothing effect on the sound. Let us call this kind of relationship 'on-off dependence.' The volume knob can be used to exercise a more fine-grained control over the sound. By turning the knob a little bit, I can make the sound a little bit louder, or a little bit softer. The volume knob can also be used to turn the sound off entirely, by setting the volume to zero. Following Lewis,[57] let us call this kind of relationship 'influence.' The bass and treble knobs also exert a kind of fine-grained control over the music. By turning them a small amount, I can subtly alter the balance of high and low pitches. However, unlike the volume knob, neither the bass nor the treble knob can be used to turn off the music completely. Let us call this kind of relationship 'fine-tuning.' I can also exercise control over the sound coming out of the speakers through my

54. 159 F.2d 169, 173 (2d Cir. 1947).

55. Lewis, *Postscripts to "Causation," in* PHILOSOPHICAL PAPERS, *supra* note 26, at 175–84.

56. *See* Nancy Cartwright, *Causal Laws and Effective Strategies*, 13 NOÛS 419, 429–33, 435–36 (1979); Christopher Hitchcock, *Probabilistic Causation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (WINTER 2011 EDITION) (EDWARD N. ZALTA ED., 2010), *available at* http://plato.stanford.edu/entries/causation-probabilistic/; ELLERY EELLS, PROBABILISTIC CAUSALITY (1991).

57. Lewis, *Causation as Influence*, *supra* note 26, at 190–91.

choice of which CD to play. Instead of *Giant Steps*, I could listen to Johnny Clegg's *Cruel, Crazy, Beautiful World*, or Dvořak's *Piano Quintet in A Major*. Indeed, through choice of CD, I can produce a much greater variety of sounds than I could using just the volume, bass, or treble knobs. However, I cannot in this way produce very small changes in the music. I cannot produce a slightly different version of *Giant Steps*,[58] say one with a slightly slower tempo, one transposed up by a tone, or one with an alternative chord progression. Nor can I produce a sound that is somewhere between Coltrane and Dvořak*,* say by eliminating the upright bass and adding a viola and cello. Let us call this kind of relationship 'discrete influence.' Thus, the sound that is coming out of the speaker depends upon the power button, the volume, bass and treble knobs, and the CD. This dependence is causal: the relationship is stable when I intervene on each of these, and I can use them to change the sound that comes out of the speakers. But the music depends upon all of these things in somewhat different ways.

This example illustrates just one dimension along which causal relationships can differ. Another dimension concerns the nature of the causal pathways whereby one factor affects another. We can ask whether the influence is relatively direct, or whether there are salient intermediate variables. In several publications[59] I have argued for the importance of the ways in which causal relationships are broken down into separate pathways, as well as for the importance of a notion of path-specific causal dependence.[60] But let's put these more complex types of causal relationship aside for now and return to the simple example of my stereo.

According to the theory developed in Lewis's "Causation"[61] the position of the power button would count as a *cause* of the music coming out of the speakers, while the position of the treble knob would not.[62] This is because Lewis's original counterfactual theory was based on counterfactuals in which

58. Unless you count the alternate take that is included as a bonus feature on the CD.

59. Hitchcock, *A Tale of Two Effects*, *supra* note 39, at 362–63; Christopher Hitchcock, *The Intransitivity of Causation Revealed in Equations and Graphs*, *supra* note 34 at 273–74; Christopher Hitchcock, *Routes, Processes, and Chance-lowering Causes*, *in* CAUSE AND CHANCE: CAUSATION IN AN INDETERMINISTIC WORLD 138–51 (Phil Dowe & Paul Noordhof eds., 2006).

60. *See also* Judea Pearl, *Direct and Indirect Effects*, *in* PROCEEDINGS OF THE SEVENTEENTH CONFERENCE ON UNCERTAINTY IN ARTIFICIAL INTELLIGENCE 411, 418–20 (2001).

61. Lewis, *Causation*, *supra* note 26.

62. This assumes that we don't take the event of the music coming out the speakers to be extremely fragile. *See* MOORE, *supra* note 1, at 412–14 (discussing the disadvantages of treating events as highly fragile).

the effect does not occur at all.[63] If the power button had not been pressed, there would have been no music; but if the treble knob had a different position, there still would have been music. On the other hand, according to Lewis's "Causation as Influence" theory,[64] the treble knob would count as a cause of the sound, while the power button would not. This is because the treble knob exerts a fine-grained control over the exact nature of the sound, while the power button does not. This is a bit odd, since the later theory was designed to deal with specific problems involving preemption, not to fundamentally change what kinds of things counted as causes.

My own, somewhat heterodox, view of these matters is that there is something a little bit funny about this whole enterprise. That is, once we learn that the music coming out of the speakers depends upon the CD, the power button, and the various knobs in the ways described, it is odd to think that there is some *further* question about which of these things are *causes* of the music, and which are not. There are various different kinds of causal relationship, and any one might be relevant for some specific purpose. For example, if my wife complains about the noise, I can use the power button or the volume knob to assuage her; changing CDs or adjusting the treble won't help. On the other hand, if I want to impress a guest with the sound quality of my stereo, adjusting the sound with the bass or treble knob might just do the trick, while turning off the power will not.

By way of analogy, consider the economic concept of *inflation*. Inflation has to do with changes in the prices of goods. Suppose that during a particular time period the price of pork rises by one dollar a pound, while the price of beef drops by fifty cents a pound. This change will have very different effects upon Hindus, Muslims, and vegetarians. More subtly, it will have different effects upon those who strongly prefer pork or beef, those who prefer to keep a variety of meats in their diet, and those who are perfectly happy to eat whatever's cheapest. Now it is often useful to distill a complex array of changes in price into a simple measure, an index of inflation. But any formula that is used to do this will necessarily build in explicit or implicit assumptions about the values of consumers. There is no one objectively correct measure of overall rate of inflation. This does not mean that inflation is purely subjective, that it is just an artificial construct of economists, or anything like that. The changes in the prices of goods are real enough, and they can have dramatic effects that cannot be 'constructed' away. Rather, inflation is complex and multi-faceted, and which facet one

63. PHILOSOPHICAL PAPERS, *supra* note 26 at 165–67.
64. Lewis, *Causation as Influence*, *supra* note 26.

should focus on depends upon the particular problem that one is trying to address.

I think something similar is true of causation. I think that the analogy with inflation is particularly apt for Moore's conception of causation as a scalar quantity.[65] Consider again the various factors that affect the sound that comes out of my stereo. How should we quantify the degree of influence that each knob exerts on the sound? If my volume knob is like the one in the movie *This is Spinal Tap*, which goes up to eleven, would that make the volume setting ten percent more of a cause than an ordinary volume knob that only goes up to ten? And how are we to weight the importance of fine-grained control (the bass and treble knobs) as opposed to ability to turn the sound off entirely (the power button)? It seems very implausible to me that there are objectively correct answers to these questions as a matter of basic metaphysics.

IV. CAUSAL RELATIONSHIPS AND PRUDENTIAL RATIONALITY

I have suggested that what kind of causal relationship one focuses on will depend upon the kind of question that one is asking. In this section, I want to illustrate this point with one particular example. Consider the concept of prudential rationality. I have in mind here the sort of concept that it is the target of various versions of decision theory.[66] An agent values different possible outcomes to various degrees. Given her values, which course of action should she pursue? In addressing this kind of question, the causal concept that is needed is just the basic notion of causal dependence, i.e., non-backtracking counterfactual dependence.

Suppose that Winesnob has a bottle of Pommard. While she likes Pommard, she would prefer a Brunello. She finds herself in a choice situation. There are three actions she could perform: A_1, A_2, and A_3. If she were to perform A_1, the status quo would be maintained. If she were to perform either A_2 or A_3, the result would be that she would lose the bottle of Pommard, acquire a Brunello, and everything else of concern to her would

65. MOORE, *supra* note 1, at 71, 109–56.

66. I have in mind, particularly, versions of causal decision theory such as those presented in Alan Gibbard & William L. Harper, *Counterfactuals and Two Kinds of Expected Utility*, *in* 1 FOUNDATIONS AND APPLICATIONS OF DECISION THEORY: THEORETICAL FOUNDATIONS 125–27 (C. A. Hooker et al. eds., 1978); Lewis, *Causal Decision Theory*, *supra* note 45, at 21–28; and JAMES M. JOYCE, THE FOUNDATIONS OF CAUSAL DECISION THEORY 146 (1999). But the idea is at least implicit in the tradition going back to LEONARD J. SAVAGE, THE FOUNDATIONS OF STATISTICS 6–27 (1954).

remain unchanged. It seems clear that she should prefer either A_2 or A_3 over A_1, but that she should have no preference between A_2 and A_3. The rationality of these preferences is settled by the outcomes of each hypothetical action; we don't need to know any more of the causal details. It does not matter if in performing A_2 her losing the Pommard is a *means* to acquiring the Brunello, while in A_3 it is merely a side effect. This does not make A_2 any less rational. It does not matter if A_2 would *cause* the Brunello to come into her possession, while A_3 would merely *allow* it to come into her possession. This would not make A_2 more rational. And it does not matter if A_2 would *preempt* some other process, which would cause the Brunello to come into her possession if she were to perform A_3 instead. That would not make A_2 any more rational than A_3. In general, the various sorts of worries that normally plague attempts to analyze causation in terms of counterfactuals play absolutely no role in assessing the rationality of her actions. All that matters is how the various outcomes depend upon her hypothetical actions.[67]

As further evidence in support of this point, I cite my favorite piece of Lewis trivia. In "Causal Decision Theory," Lewis advocates a decision theory that incorporates causal considerations, and then formulates a specific version of causal decision theory.[68] But there is a curious omission: he never makes use of his own theory of causation.[69] This seems very strange. The most influential philosopher of the twentieth century to write on causation argues that decision theory should be based on causation, and then in formulating such a theory, he ignores his own account of causation! The reason, I think, is this. In his theory of causation, he does not identify causation with counterfactual dependence, but adds some bells and whistles in an attempt to deal with preemption. But for purposes of decision, it is just the non-backtracking counterfactuals that are wanted.

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67. Note, that as a linguistic matter, the propositions that Winesnob must entertain are future hypotheticals, rather than counterfactuals. She reasons: "if I were to perform *A2*, then I would acquire the Brunello;" not "if I had performed *A2*, I would have acquired the Brunello." As a sociological fact, philosophers tend to use the word 'counterfactual' in a broader sense than others, meaning roughly 'subjunctive conditional.' It is not essential that the antecedent be contrary to fact, nor that the conditional be expressed in the past tense. The future hypotheticals that Winesnob must consider are counterfactuals in this broad sense. What is important for my purposes is that the sort of dependence expressed by both past tense counterfactuals and future hypotheticals is essentially the same.

68. Lewis, *Causal Decision Theory*, *supra* note 45, at 12.

69. *Id.* at 21–28. Lewis does briefly cite his 1973 paper "Causation," but only in the context of arguing that counterfactuals should be given a non-backtracking interpretation. *Id.* at 22.

This connection between what I have been calling 'causal dependence' — i.e. what Lewis variously calls 'causal dependence,' 'causal counterfactuals,' and 'non-backtracking counterfactuals' — and rational decision-making, suffices to show that causal dependence deserves its name. That is, I take it that it as more or less axiomatic that it is rational to try to act so as to cause desirable outcomes, and not merely to perform actions that are correlated with good outcomes. At least, I take this connection between causation and rationality to be at least as central to the notion of causation as any connection between causation and morality.

However, unless one is a hardcore utilitarian,[70] one thinks that the basic relation of causal dependence is *not* the one that is central to moral evaluation. In order to know whether act A_1 is morally preferable to act A_2, it is not enough to know what the ultimate consequences of these hypothetical acts would be. One also needs to know something about the details of how these consequences come about. It is, I think, one of the very deep problems of philosophy just why this should be so.

I do not want to fault Professor Moore for omitting to solve this problem: it is an extraordinarily difficult one. But I think that the existence and importance of the problem gets obscured somewhat in his treatment of the connection between causation and morality. Moore uses 'causation' to pick out a much more specific and selective kind of relationship than my causal dependence.[71] As the discussion in the previous section makes clear, I am skeptical that there is some objective, metaphysical relation of the sort Moore has in mind. But let us put those worries aside and suppose that there is some kind of relationship that is objective, that has more or less those features that Moore describes, and that accords well enough with ordinary uses of the verb 'cause' to deserve the name. Still, there would be a question about just why *this* concept plays such a central role in morality. It is not enough just to point to truisms such as that it is prima facie wrong to cause harm. It is equally a truism that it is rational to try to cause good outcomes. But as we have seen, the relation that figures in the latter truism is not the narrower relation of causation that Moore is interested in, but rather my broader notion of causal dependence. So there must be something specific about Moore's narrower relation of causation that makes *it*, rather than my broader notion of causal dependence, central to morality in particular. It is not enough to say that this relation is central to morality because it is *the causal* relation.

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70. Perhaps Shelly Kagan, Alastair Norcross, or Peter Singer would qualify.

71. Moore, *supra* note 1, at 302–14, 396–400, 435–67.

V. PREVENTIONS, OMISSIONS, AND DOUBLE PREVENTIONS

I now want to bring our differences, as well as the problem raised at the end of the last section, into sharper focus. I will do this by considering Moore's treatment of preventions, omissions, and double-preventions in Chapter Eighteen.[72] We may illustrate these three relations using variations on an example given by Moore. Suppose Victim is struggling in the water, and will drown unless someone saves her.[73] If Defendant pulls her out of the water, he *prevents* her drowning. She does not drown, but she would have if not for Defendant's action. If instead Defendant sits idly by and watches her drown, although he could have saved her with minimum risk and inconvenience to himself, he *omits* to save her.[74] He did not save her, but if he had, she would not have drowned. Finally, suppose that Defendant himself is a poor swimmer, and unable to save Victim. However, there is a lifeguard standing by. Defendant ties up the lifeguard, and Victim drowns. If Defendant had not tied up the lifeguard, she would have saved Victim from drowning.[75] Defendant's action is a *double preventer* of Victim's drowning: he prevented an event that would have prevented her from drowning.[76] What these relations have in common is that they all involve the *absences* of certain events. In the case of prevention, the absence of drowning is a result of Defendant's action. In the case of omission, it is Defendant's action that is absent. In the case of double prevention, the missing event, the lifeguard's saving Victim, is an intermediary between Defendant's act and the ultimate outcome. In addition to these three relations, Moore defines a fourth, (non-omissive) *allowing*. Since allowing is a special case of double prevention, I will not discuss it separately.

It will be helpful to have some non-question-begging terminology for those causal relationships that do not involve absences, such as when Defendant hits Victim over the head with a baseball bat. So let us call this a case of *simple causation*.[77]

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72. *See id.* at 178–97.

73. *See id.* at 62.

74. *See id.* at 62–63.

75. *See id.*

76. The term 'double prevention' was coined by Ned Hall. *See* Ned Hall, *Causation and the Price of Transitivity*, 97 J. PHIL. 198, 201-02 (2000); Ned Hall, *Two Concepts of Causation*, *in* CAUSATION AND COUNTERFACTUALS, *supra* note 26, at 225, 241. However, the term is slightly misleading, there are not two preventions, but rather the single prevention of a potential preventer. 'Prevention–prevention' might have been more apt.

77. Moore, in effect, believes that all causation is simple causation, but it is helpful to have terminology that does not presuppose this.

Moore defends four inter-related theses about prevention, omission, and double prevention:

1. They are not types of causation.

2. There is a moral difference between these relations and simple causation.

3. Preventers, omissions, and double preventers do not enter into relations of preemption or overdetermination.

4. In cases of prevention, omission, and double prevention, the basis for moral and legal liability for the outcome (if any) is counterfactual dependence.

Let us look at these claims more closely.

Moore argues that cases of prevention, omission, and double prevention are not cases of causation precisely because they involve absences.[78] The absence of an event is literally nothing; it is not the sort of thing that can cause or be caused. For instance, in our example of omission, Defendant's failure to rescue Victim cannot be a cause of anything, since there is nothing there to do any causing. In cases of prevention and double prevention, *something* may be caused. In the case where Defendant rescues Victim, Defendant's action causes Victim's body to be moved to the beach; in the case where Defendant ties up the lifeguard, Defendant's action causes the lifeguard to be tied up. However, Moore claims that in the case of prevention, Defendant's action does not cause the absence of Victim's drowning. Only genuine events can be effects. In the case of double prevention, Defendant's tying up the lifeguard does not cause Victim's death; that is caused by the rip current, the water entering her lungs, and so on.

According to Moore, there is a moral difference between simply causing some harm, and omitting to prevent that harm, preventing something that would have prevented that harm, or preventing the receipt of some benefit.[79] Typically, it is worse to simply cause some harm than it is to bear one of these other relations to that same harm (or to an equivalent benefit, in the

78. MOORE, *supra* note 1, at 444–51, 453–59, 460–67.
79. *Id.* at 426–60.

case of prevention).[80] For example, while we might well judge that Defendant violated a moral duty in failing to rescue Victim, or in tying up the lifeguard, we would not judge Defendant as harshly as we would if Defendant had simply killed Victim, say by hitting her on the head with a baseball bat. This moral difference rests squarely on the previously discussed causal difference. Typically, culpably causing some harm is the most serious type of moral transgression.[81]

This moral difference is reflected in the relative ease with which preventions, omissions, and double preventions can be justified on consequentialist grounds.[82] For instance, it would be morally wrong for Defendant to kill Victim by hitting her over the head with a baseball bat, even if he uses her organs to save others who would otherwise die. We do not accept such a consequentialist justification for such a flagrant violation of one's moral duties. On the other hand, it might be permissible to fail to save one person, if one can thereby save three others. Suppose, for instance, that Victim is drowning at the north end of the beach, three others are drowning at the south end, and there is only one lifeguard. The lifeguard can't reach both groups on time, so she elects to rescue the three. In this case, we think that the lifeguard was morally justified in failing to rescue Victim.

Preemption and overdetermination are relations that exist among causes and potential causes.[83] Since preventers, omissions, and double preventers are not causes, they cannot be overdetermining causes or preempting causes.[84] Consider McLaughlin's famous example.[85] A traveler is about to cross the desert with several barrels of water. One enemy empties the water from the barrels. A second enemy, ignorant of the actions of the first, steals the barrels. The traveler dies of thirst in the desert. If either enemy had acted alone, this would have been a case of double prevention. In the original case, however, neither enemy prevented the traveler from having water. The traveler would have been without water in any event, due to the action of the other enemy. According to Moore, neither act preempts the other, nor do the acts stand in a relation of overdetermination.[86] The acts do not bear *any*

80. *Id.* at 447–49, 453, 460.
81. *See, e.g.*, *id.* at 95.
82. *Id.* at 448.
83. *Id.* at 410–21.
84. *Id.* at 449–52, 457–59, 466–67.
85. James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 n.25 (1925).
86. MOORE, *supra* note 1, at 466.

causal relationship to the traveler's death, so the question of which preempted which is moot.

Finally, Moore claims that agents can be morally responsible and legally liable for outcomes in cases of prevention, omission, and double prevention. Of course, this requires culpability, or *mens rea*, but let's put this aside. In these cases, the basis for *actus reus* is not causation of harm. Rather, the basis lies in the counterfactual dependence of the harm on the agent's action or inaction.[87] In the case where Defendant fails to rescue Victim, we might hold Defendant accountable for Victim's death on the grounds that Victim would not have died if Defendant had rescued her. In the case where Defendant ties up the lifeguard, we might hold him accountable for Victim's death on the grounds that she would not have died if Defendant had not acted as he did. Where there is no counterfactual dependence, there can be no liability for the outcome, although there can still be a form of inchoate liability, analogous to liability for attempting to cause harm.[88] Thus, for example, in McLaughlin's example, neither enemy can be held morally responsible or legally liable for the traveler's death. Each enemy could, however, have an inchoate liability.[89]

I wish to reconsider Moore's four theses in light of my own metaphysical picture, as outlined in the previous two sections. First, as a purely sociological observation, philosophers have defended just about every position imaginable with respect to preventions, omissions, and double-preventions. Helen Beebee sides squarely with Moore in claiming that these are not cases of causation.[90] Phil Dowe also comes close to Moore's view, arguing that preventers, omissions, and double preventers are not literally causes, but only 'cause' or 'quasi-cause' the outcomes in question.[91] Hall claims that there are two distinct causal relations: production and dependence.[92] While preventers, omissions, and double preventers do not produce effects, effects do depend upon them. Thus, Hall thinks that preventers, omissions, and double preventers have a kind of secondary causal

87. *Id.* at 436, 451–53, 459–60.

88. *Id.* at 467.

89. Note, however, that if Moore is right, this would not be liability for attempted homicide. For even if one of them had been successful, she would not have literally *killed* the traveler.

90. Helen Beebee, *Causing and Nothingness*, *in* CAUSATION AND COUNTERFACTUALS, *supra* note 26, at 291.

91. PHIL DOWE, PHYSICAL CAUSATION 123, 129 (2000); Phil Dowe, *A Counterfactual Theory of Prevention and 'Causation' By Omission*, 79 AUSTL. J. PHIL. 216, 217 (2001).

92. *See* Ned Hall, *Two Concepts of Causation*, *in* CAUSATION AND COUNTERFACTUALS, *supra* note 26, at 225.

status.[93] Lewis[94] and Jonathan Schaffer[95] argue that preventers, omissions, and double preventers are full-blooded causes. And Sarah McGrath claims that omissions are sometimes causes, depending upon their normative status; she concludes that causation is thus partly a normative notion.[96] The experiments of Clare Walsh and Steven Sloman[97] show that ordinary subjects are also divided about the status of double preventers.

To my ear, this has all the symptoms of a purely verbal dispute. Moore and Beebee, on the one hand, and Lewis and Schaffer, on the other, do not disagree about what is actually going on in any of these cases. They do not disagree about what events occur, about what counterfactually depends upon what, or about what mechanisms are operative. The disagreement is only about whether to *classify* cases of prevention, omission, and double prevention together with cases of simple causation under one heading: 'causation.'

What all parties should agree upon is that cases of prevention, omission, and double prevention are like cases of simple causation in some respects, but not in others. One respect in which they are similar is that in paradigm cases of each, there is non-backtracking counterfactual dependence. When Defendant hits Victim in the head with a bat, and when Victim ties up the lifeguard, Victim's death counterfactually depends upon Defendant's act: Victim would not have died if Defendant had acted differently. I have already argued that the sort of counterfactual dependence that is present in cases of prevention, omission, and double prevention, and which Moore takes as the basis for liability in such cases, is the same kind of non-backtracking counterfactual dependence that Lewis needs for his counterfactual theory of causation. This counterfactual dependence means that preventers, omissions, and double preventers can all be means for pursuing one's desired ends. From the point of view of prudential rationality,

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93. *Id.* at 241–42, 248–49, 252–57.

94. *See* Lewis, *Causation as Influence*, *supra* note 26, at 187, 194, 196; David Lewis, *Void and Object*, *in* CAUSATION AND COUNTERFACTUALS, *supra* note 26, at 284–85.

95. *See* Jonathan Schaffer, *Causation by Disconnection*, 67 PHIL. SCI. 285, 294–96 (2000); Jonathan Schaffer, *Causes Need Not Be Physically Connected to Their Effects*, *in* CONTEMPORARY DEBATES IN PHILOSOPHY OF SCIENCE 197, 197 (Christopher Hitchcock ed., 2004).

96. *See generally* Sarah McGrath, *Causation by Omission: A Dilemma*, 123 PHIL. STUD. 125 (2005).

97. *See generally* Clare R. Walsh & Steven A. Sloman, *The Meaning of Cause and Prevent: The Role of Causal Mechanism*, *in* PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 2331 (2005).

it makes no difference whether one achieves one's goal by causing it, or by allowing it to happen.

Moore claims that there is nonetheless a difference on this point. Counterfactual dependence is not *necessary* for causation, because there can be cases of causal overdetermination or preemption. By contrast, counterfactual dependence is necessary for prevention, omission, or double prevention. Preventers, omissions, and double preventers do not participate in relations of overdetermination or preemption. We will return to this issue shortly, when we discuss Moore's third claim.

One prominent difference between cases of simple causation, and cases of prevention, omission, and double prevention, is that in the former cases there is always some causal process that that transmits energy and momentum between the cause and the effect. For example, when Defendant strikes Victim's head with a bat, energy and momentum are transferred through Defendant's arms to the bat, and onto Victim's head. By contrast, when Defendant ties up the lifeguard, there is no process initiated by Defendant's action that carries energy and momentum from Defendant to Victim.[98] Dowe, especially, takes this difference to be crucial. [99]

A second difference is that typically, in cases of simple causation, the fine-grained details of the effect depend upon the fine-grained details of the cause. For example, when Defendant strikes Victim in the head, the exact extent of Victim's injuries, the location of the injuries on her head, and the time of her death, all depend upon the precise way in which Victim strikes her – the placement of the bat, the velocity and timing of the swing, and so on. By contrast, when Defendant ties up the lifeguard, the details of Victim's drowning – precisely where she drowns, when she dies, how much water fills her lungs, etc. – do not depend upon the details of how Defendant ties up the lifeguard – how thick the rope is, what kind of knot is used, exactly where she is tied up, etc.

A third difference is that cases of prevention, omission, and double prevention, by their very nature, require that there be some other substantial causal factor at work. In all of our examples, there would be no prevention, omission, or double prevention if Victim weren't in the water drowning. When Victim dies (in the cases of omission and double prevention) the water, the rip current, etc., must surely be included among the causes of death. But this need not be the case in cases of simple causation. When Defendant hits Victim with a bat, there need be no other substantial factor at

98. Except, perhaps, for trivial and irrelevant ones, like photons and sound waves.
99. Dowe, PHYSICAL CAUSATION, *supra* note 91 at 123–45.

work in Victim's death. Some cases of simple causation will also have other substantial factors, however. For example, if Defendant pushes Victim in front of a bus, the bus itself is a substantial factor in Victim's death.

A related point is that cases of prevention, omission and double prevention require certain kinds of fortuitous circumstances. It is only because Victim is struggling in the water that Defendant can prevent her from drowning, omit to save her, or prevent her from being saved. If Defendant is a professional hit man, he would not be able to earn much of a living by tying up lifeguards. It is only in a very special kind of circumstance that tying up a lifeguard will result in the death of one's intended victim. By contrast, striking someone in the head with a bat is a more reliable way of bringing about their death. One's victim must be within bat's reach, but beyond that, no fortuitous circumstances are needed.[100]

Now suppose we agree with Moore that these (and other) differences between preventers, omissions, and double preventers, on the one hand, and simple causes, on the other, are substantial enough that we should not group them all together under the heading 'causation.' The point I want to urge is that any *moral* difference that exists prevention, omission, and double prevention, on the one hand, and genuine causation on the other, must rest on one or more of these *specific* differences between them. The bare fact that one type of case is classified as *causation*, while the other is not, does not do any explanatory work by itself.

As far as I can see, the first two differences don't offer much promise for grounding a moral difference. The first concerns the means whereby Victim's death is made dependent upon Defendant's actions. It is hard to see what moral difference could rest on the use of means that involve the transmission of energy and momentum. If there were magical beings that could kill through telekinesis, this unusual mechanism would hardly absolve them of the strongest form of moral responsibility for abusing their power. The second difference might be relevant if we think that Defendant is especially culpable for bringing about Victim's death in a slow and painful fashion. But in the example where Defendant hits Victim with a bat, the sorts of fine-grained differences in the way Victim could die do not seem to make a moral difference. Morally, it makes no difference whether Victim dies at seven minutes and nine seconds past noon from a contusion in the right parietal lobe, or at seven minutes and ten seconds past noon from a contusion

100. This is related to the distinction between sensitive and insensitive causation, discussed by Lewis, *Postscripts to "Causation*," *supra* note 26, at 184–88, *and* James Woodward, *Sensitive and Insensitive Causation*, 115 PHIL REV. 1, 2 (2006).

in the left occipital lobe. So it is hard to see how dependence of such fine-grained details on Defendant's action could be morally significant. By contrast, the third and fourth differences do seem morally relevant. In our drowning scenarios, it was Victim's choice to go swimming in an area prone to dangerous rip currents, despite being a weak swimmer. Defendant played no role in creating the perilous conditions, nor in directing them toward Victim. Thus, it might be reasonable to conclude that Defendant's contribution to Victim's death was only partial. On the other hand, similar remarks apply if Defendant pushes Victim in front of a bus, and I doubt that anyone would think that the substantial causal contribution of the bus in any way diminishes Defendant's moral responsibility. I will leave it to others to try to spell out the details of such an account. My present point is that this is the *sort* of story that would be necessary to explain a moral distinction between simple causation, and omission, prevention, and double prevention.

There is another important moral difference specifically in the case of omissions. Duties not to omit are *positive* duties: they are duties to perform certain actions. The logic of such positive duties is different from the logic of negative duties. Consider, for example, the positive duty to offer aid to those in need, and contrast it with the negative duty to refrain from killing. A negative duty does not impose increasing demands upon one's time, energy, and resources as the number of people to whom one owes that duty increases. No one has ever woken up in the morning and said: "not only do I have to refrain from killing Amy, I have to refrain from killing Bob and Carly and David and Ethel . . . There are only twenty-four hours in a day; how am I ever going to get all that refraining done?" By contrast, the duty to offer aid does impose increasing demands on one's time, energy, and resources, pretty much in direct proportion to the number of people to whom it is owed.[101] For this reason, we cannot reasonably expect any one person to offer aid to everyone who might need it. Rather, our positive duty to aid is restricted to providing aid to a small number of people. Similar differences arise if we look at the situation from the other side. In order for Victim to enjoy his right to life and bodily integrity, it is not enough that Defendant refrain from killing him; Amy and Bob and Carly and David and Ethel and every one else must refrain from killing him. On the other hand, if Victim is injured and in need of medical attention, he does not need every one to aid him. In fact, he would probably be worse off if *everyone* rushed to his aid.

101. This was a recurring theme in the television series *Lois and Clark: the New Adventures of Superman.* Clark's romantic dates with Lois were disrupted when anyone, anywhere in the world, shouted 'help!'

What he really needs is for a few well-placed and qualified individuals to aid him. Thus, our negative duties tend to be relatively hard and fast; by contrast, it is often a lot less clear when one person owes a positive duty to another.

Despite these differences between simple causation and prevention, omission, and double prevention, I think that the moral differences between them are not nearly as strong as Moore maintains. In particular, I find his argument[102] that consequentialist justification is more readily available in cases of prevention, omission, and double prevention to be suspect. It seems to me that there is something right in the idea, enshrined in both the Doctrine of Double Effect,[103] and in Kant's Categorical Imperative,[104] that there is something especially problematic about treating a person as a mere means. It is in these cases that consequentialist justification is so hard to come by, and these cases cut across the distinction between simple causation, and prevention, omission, and double prevention.

Moore supports his claim for a moral distinction by contrasting two cases.[105] In the first hypothetical, Defendant[106] uses a rope to save three people from drowning instead of saving one; thus omitting to save that one. In the second case, one person is using a rope to get out of the water, and Defendant drowns him by holding his head underwater in order to take his rope and use it to save three others. Moore claims, correctly, the first act is morally justified while the second is not. He writes: "How are we to make sense of the moral distinction except with a metaphysical distinction between killing and not-saving . . . between actions causing (death) and omissions failing to prevent (death)?" [107]

But there is another, crucial, distinction between the two cases. Only in the second case is the drowning victim used as a means to save the other three. I think it is really this distinction that is driving our moral judgment. To make this clear, let us consider two new examples. First, suppose that Defendant is driving, and suddenly comes upon three children who are playing in the road. She can swerve to miss them, but in doing so, she will hit a fourth child, who is also playing in the road. In the full knowledge that she

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102. MOORE, *supra* note 1, at 447–49.

103. First formulated by Thomas Aquinas in SUMMA THEOLOGICA II-II, Qu. 64, Art.7 (1274).

104. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 17–20 (1785).

105. MOORE, *supra* note 1, at 448.

106. Moore himself in his exposition.

107. MOORE, *supra* note 1, at 448.

will hit and kill the one child, she swerves.[108] Defendant's action clearly *caused* the one child to die. She was in command of the vehicle that directly hit the child. If she had performed this action without the justification of avoiding the three children in the road, she would have been guilty of a grave moral wrong. Nonetheless, most of us think that her action was justified by saving the lives of three other children. This example involves simple causation, but consequentialist justification is available because Defendant did not use the one child as a means to saving the others. Now consider a case where Victim arrives at the emergency room of a hospital with a ruptured appendix. His condition is easily treatable with surgery, but without intervention, he will die. He is put under the care of Dr. Defendant. Dr. Defendant happens to have three other patients in her care, all of whom need organ transplants in order to survive. Dr. Defendant does not perform surgery on Victim, letting him die. She then uses Victim's organs to save the lives of the three other patients. Even if we grant that Dr. Defendant's omission did not *cause* Victim to die, most of us would regard her as morally responsible for Victim's death. Saving three lives does not justify letting Victim die. So even though this is a case of omission, consequentialist justification is not available.

Moore's claim of moral difference is particularly implausible in many cases of double prevention.[109] To consider just one more example, suppose that Defendant sabotages the brakes in Victim's car. Suppose, for example, that he removes all of the brake fluid. Victim later dies when she is unable to stop her car and she collides with a truck. This is clearly a case of double prevention. What Defendant has literally caused, in Moore's framework, is the change in location of the brake fluid. The cause of Victim's death is the collision of her car with a truck. Would anyone think that Defendant's moral

108. Note the similarity to one version of the classic trolley problem. *See, e.g.*, Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5–15 (1967) *reprinted in* PHILIPPA FOOT, VIRTUES AND VICES 19–32 (Oxford Univ. Press ed. 1978); Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 THE MONIST 204, 206–08 (1976).

109. I put aside here a class of cases of double prevention that Moore thinks are 'close enough' to actual causation to be treated as such for purposes of moral assessment. *See* MOORE, *supra* note 1, at 461–63. For example, suppose Defendant shoots Victim with a gun. The mechanism by which a gun fires involves double prevention. Moore claims that what Victim actually causes, the removal of a sear that holds back a spring, is 'close enough' to something that actually causes death, namely the movement of the spring. *Id.* at 462–63. Although I think Moore's treatment raises some interesting problems, I will confine my discussion to cases in which the double prevention structure is more obvious.

responsibility for Victim's death is any less for not having simply caused it? Would any jury of Defendant's peers fail to convict him of murder?

Finally, consider Moore's third and fourth claims about preventions, omissions, and double preventions. Moore is certainly correct that there are some cases where it is unclear whether one event preempts another, stands in an overdetermination relation, or is simply irrelevant. John Collins[110] makes a related point regarding prevention: sometimes it is unclear whether event *A* preempts *B* in preventing *C*, or whether because of *B*, *C* was never in danger of happening in the first place. But equally, I think there are cases where it is clear what the relations are. Suppose, as in Moore's example that Defendant ties up the lifeguard, while Victim drowns. Now let us embellish the story: Backup would have tied up the lifeguard if Defendant had not. Or suppose that Backup stole Victim's heart medicine, and Victim would have died of a heart attack if she hadn't drowned first. Or suppose Victim simply misplaced her heart medicine, with the same effect. In all of these cases, Victim's death does not counterfactually depend upon Defendant's action, because of a backup double preventer. Nonetheless, in each case, Victim drowns, and it is Defendant's action that stands to this drowning in a relation of double prevention. Defendant's tying up the lifeguard *preempts* the backup double preventer in each of these cases. And I think that in each of these cases, we would hold Defendant responsible for Victim's death to the same extent that we would if no backup had been present. We would not restrict Defendant's liability to an inchoate liability similar to liability for attempt. Analogously, consider my example where Defendant sabotages Victim's brakes. Suppose that if Defendant hadn't done so, Backup would have. Or that Backup sabotaged Victim's steering. Or that the steering was about to fail on its own.[111] In each of these cases, Victim would have died even without Defendant's action. Nonetheless, Defendant's action bears the same relation to Victim's death that it would have without the backup double preventer. And we would still hold Defendant liable, not just for the attempt, but for Victim's death.

Thus it seems to me that preventers, omissions, and double preventers can at least sometimes enter into relations of preemption and overdetermination, and that in such cases, there can be liability for the outcome in the absence of counterfactual dependence. More generally, I

110. John Collins, *Preemptive Prevention*, 97 J. PHIL. 223, 223–25 (2000).

111. In the last two cases, imagine that Victim dies in a collision with a truck in a long, straight tunnel, in which she attempted to apply the brakes, but made no attempt to steer out of the way. Past the tunnel was a windy stretch of freeway, where Victim would have died if she traversed it with faulty steering.

think the differences between cases of simple causation, and cases of prevention, omission, and double prevention are not nearly as striking as Moore maintains. And to the extent that there are moral differences between them, this difference is still in need of explanation.

VI. CONCLUSION

While I have focused on sketching my own alternate conception of the underlying metaphysics, and have raised some challenges for Moore, I do not want to leave the reader with the impression that I find much of the book wrong-headed. On the contrary, it is thoughtful and well-argued throughout. There are many places where I am in almost complete agreement, such as his critique of the harm-within-the-risk theory, and his critique of intervening cause doctrines. But a litany of points of agreement would make for boring reading. I hope that even in voicing my objections, my discussion will convey to the reader some sense of the scope, ambition, and excitement of Professor Moore's book. [112]

112. Thanks to Michael Moore and Carolina Sartorio for comments on an earlier draft. Thanks also to participants in the symposium on *Causation and Responsibility* at Rutgers University School of Law – Camden.